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ABSTRACT

This report provides an overview of the struggle to desegregate schools in the United States. It describes the two phases of desegregation, focusing on court decisions that influenced desegregation and how these decisions changed the composition of the schools. It opens with the 1849 decision that asserted that desegregation was for the good of both races, and then quickly traces the progression to "Plessy v. Ferguson" (1896), which established that separate but equal met the requirements of the Fourteenth Amendment. The report outlines events leading up to the "Brown" decision and the court order that desegregation efforts were to be approached with all deliberate speed. Following the "Brown" case, questions arose over de jure and de facto segregation and the issue of freedom of choice. Much of this debate culminated in the landmark case "Swann v. Charlotte-Mecklenberg Board of Education," which reaffirmed the fact that district courts have broad powers to fashion remedies in desegregation cases and may use experts for the development of desegregation plans, such as racial quotas, one-race schools, and transportation. During the 1970s, freedom-of-choice debates arose with pressing frequency, particularly as concerns judicial power. The 1980s witnessed a loosening of court jurisdiction and a return to the concept of neighborhood schools. (Contains 35 endnotes.) (RJM)

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The More We Change...

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Prior to the 1950s, many states permitted racial segregation, with courts adhering to the *separate but equal* doctrine announced by the Supreme Court in the 1896 Plessy v. Ferguson case. This decision, coupled with Jim Crow laws, resulted in de jure segregation that affected public accommodations, extended to public education, and continued well into the 20th Century. Simply stated, the judicial system was content to allow *access* to racial minorities but gave no heed to the issue of equity and little attention to equality.

In the 1950s, the concerns of federal courts relative to desegregation were quite simple. *Equality of opportunity* and *access* were key and, as such, were enunciated over and over in such landmark cases as Brown I and II. If such equality could be achieved within the context of a *freedom of choice* plan, federal jurists were more than willing to approve that approach.

During the 1960s and '70s, the focus of litigants and the courts in desegregation cases turned to *equity*. Increasingly, courts delved into specific components of desegregation plans and alternately suggested and required inclusion of these components in the "plan," as well as compliance with the written plans after such inclusion. Frequently in the 1970s, the courts began to consider any allowance of so-called freedom of choice to be a prima fasciae cause of defacto segregation. In fact, in the Green case, the court had made the point that freedom of choice was not an end in itself in desegregation of school districts.[1] Freedom of choice was not seen as an acceptable or sufficient step in the transition to unitary status, ie., release from the aegis of the courts with the establishment of the fact that the district is not engaged in or tacitly approving segregative activities or policy, and that absent any actions of the school district as represented by the board of education, defacto segregation will not lend itself to a re-intervention of court monitoring.

Courts held that the state, as represented by the school board, must provide a remedy or remedies to address segregative activities and effects. Such remedies were to be affirmative and positive to include many forms of address including but not limited to busing and quotas. In the Swann Case, the court noted that in addition to busing, districts could close schools, build new schools, reassign students, reconfigure grade assignments, and racially mix faculties.[2] These were but a few of the suggested and allowable approaches to desegregation.

Beginning in 1972, national cases portended the end of freedom of choice. First, the court added to the equation for desegregation that, in addition to the established standard of pairing and changing student assignments and attendance zones, consideration of motives was not sufficient; the effects of actions taken would have to receive major consideration.[3] Second, the court addressed the issue, not unlike that raised in Brown I, of the quality of facilities of inner city schools calling for these facilities to be comparable to those found in predominately white suburban areas.[4] Finally, the court placed the burden on the school district and its officials to prove that their actions were not motivated by segregative intent; in fact, the court "observed that community and administrative attitudes must be taken into

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consideration."[5]

Once these parameters were clearly defined, the goal of most school boards presiding over school districts that had been touched by law suits became the achievement of unitary status. Throughout the 1980s, however, desegregation issues continued to arise in districts, and remedies began to include annexation of parts of contiguous districts into desegregating districts (as was the case in Little Rock, Arkansas) and the combination of districts into one district (as in the case of Atlanta and Dekalb County, Georgia).

Since the 1980s, there has been racial strife within many districts, and in the case of Dallas, Texas, within the membership of the school board. However, as more and more districts are released from court jurisdiction, there is a return in many of these districts to the concept of neighborhood schools and freedom of choice. Courts do not seem to be intervening in these cases. It is clear, however, that issues relative to desegregation continue to exist even in the face of significant changes in the philosophy of the courts from freedom of choice and back toward it between 1974 and 1997.

Some researchers, such as Gary Orfield of Harvard University, are alleging that the change in the courts' philosophical position to a return to allowing freedom of choice in districts that have achieved unitary status is evidence that the nation is headed backwards toward greater segregation of black students, particularly in the states with a history of de jure segregation. Simultaneously, there is an increasing call from black leaders for schools that are not only all black but also, in some cases, single sex schools. Additionally, both black and white parents are tending to agree with the court that like freedom of choice, busing, and other remedies have not managed to completely dismantle the old dual system even though both black and white parents may tend to favor integration.

Currently, "the challenge (for citizens and undoubtedly for the legal system including the courts) is to understand the present situation as it has arrived from the past and to chart a new path to a stable public school system. In an effort to do that, the courts and seemingly the public have come virtually full circle in terms of methodology for accomplishing the goal. Happily, however, there is an abiding conviction of the importance of integration and desegregation innate to society as a result of more than forty years of litigation and self-examination by our American public school system.

Background and Significant Cases

The pre-1850 education of a black Bostonian youngster, Sarah Roberts, provided the genesis for the well-known doctrine of separate but equal.[6]

Roberts v. City of Boston, 59 Mass. 198 (1849). The opinion of Justice Shaw of the Massachusetts Court established the viewpoint that school segregation was for the good of both races.

Fourteenth Amendment (1868). Although it included the Equal Protection Clause, the Supreme Court continually determined that equal protection had no application to private enterprise.[7] Moreover, with the Mississippi state statute upheld that required

segregated train cars, the Equal Protection Clause being circumvented, "state-enforced classification of citizens by race was made possible."[8] As a result, Southern states began extending the private custom of discrimination into state law, and Jim Crow laws, originating in Florida in 1887, became prevalent.

Plessy v. Ferguson, 163 U.S. 537, 1896. Established the national standard for applying the Fourteenth Amendment according to local custom and tradition.[9] The U.S. Supreme Court determined that separate but equal was constitutionally acceptable thereby establishing it as a legal principle, with the opinion extended to education by implication. Furthermore, the federal judiciary continually upheld the rights of states to determine their methods of education, e.g., in Cumming v. Richmond County Board of Education (175 U.S. 528, 20 S.Ct. 197, 1899), Berea College v. Commonwealth of Kentucky (211 U.S. 45, 29 S.Ct. 33, 1908), and in Gong Lum v. Rice (275 U.S. 78, 48 S.Ct. 91, 1927) the federal courts supported unlimited state discretion in maintaining a separate system of education for the races.[10]

Missouri ex rel. Gaines v. Canada, 305 U.S. 337, 59 S.Ct. 232, 1938. The greatest challenge to the practice of separate but equal education was initiated by the N.A.A.C.P.[11] The U.S. Supreme Court reasserted its judicial authority in applying the Equal Protection Clause leading to relief at post-secondary school institutions.

West Virginia State Board of Education v. Barnette, 319 U.S. 624, 1943. A change in the direction of the court with regard to the common school occurred in this case. The court held that state actions taken against that which the Fourteenth Amendment protects include actions by a state board of education. The decision implied that state actions can limit Fourteenth Amendment rights, but that individual students have rights that may not be violated by actions of the state.

Brown v. Board of Education of Topeka, Kansas, 347 U.S. 483, 1954. Also known as Brown I, was the first case to address student rights in public education rather than student rights in relation to attendance at graduate or professional schools. Chief Justice Earl Warren, writing for the court, stated: "We conclude that in the field of public education the doctrine of separate but equal has no place. Separate educational facilities are inherently unequal."[12]

Bolling v. Sharpe, 347 U.S. 294, 1954. A companion case to Brown, it addressed segregation as it related to children in the schools in the District of Columbia. The Supreme Court extended the term "liberty," as it is used in the Fifth Amendment, to the full range of conduct that the individual is free to pursue and that cannot be restricted except by a proper government objective. Segregation was not such a government objective.

Brown v. Board of Education of Topeka, 349 U.S. 294, 1955, "Brown II." Heard by the Supreme Court as it addressed the question of relief, ie., the remedy for and enforcement of that which would bring about the end of desegregating practices addressed in Brown I. Chief Justice Warren in speaking for the court declared that

desegregation efforts were to be approached "with all deliberate speed."[13] The court also held that school authorities have the primary responsibility for solving problems that may require such solutions as are necessary to fully implement constitutional principles.

The main struggle to secure racially balanced schools occurred in two phases and took place in the courts. Initially most desegregation occurred as a result of parents' desire for their children, or students themselves deciding, to attend a particular school that was segregated by policy or law. Therefore, the earliest, first-phase attention was focused on the de jure segregated schools with the later phase focusing on de facto segregated schools. The court's attention would turn to cases of de facto segregation, namely, situations in which there was an absence of intent to segregate but in which segregation did occur due to community demographic patterns or past action not intended to segregate. While de jure segregation is unconstitutional, de facto segregation would be held as not violative of the constitution. Such situations had to be scrutinized, however, to ensure that, in fact, there was lack of intent.

During the early years following Brown, the focus was on de jure segregated schools in Southern states and comprised cases challenging the notion that Brown merely prohibited segregated schools. The most blatant example occurred early in the 1960s in Prince Edward County, Virginia where the public schools were closed, and private schools operated using state and county monies. This strategy, a freedom of choice plan, was a school policy whereby a student's parents could select the school that they wished their child to attend without regard to attendance zones.[14] In Griffin v. County School Board of Prince Edward County (377 U.S. 218, 1964), the Supreme Court struck down Virginia's freedom-of-choice plan and ruled that the closing of public schools and the contribution of tax funds so that students might attend segregated private schools was a violation of the Equal Protection Clause.

In Northern states, residential patterns had created racially segregated schools. In time, black families began moving and enrolling their children in all-white schools. In these cases, a multitrack system of education was generally introduced that separated the children into groups according to their learning ability. This approach, in effect, separated the students along racial lines and proved to camouflage a highly segregated educational program.[15]

Although no one questioned that Brown prohibited the government from compelling segregation, a question did arise as to the necessity of government intervention to promote integration. As such, attention was focused on defining the concepts *integration* and *segregation*, especially in the Northern courts.[16] What resulted was the view that the Constitution forbade segregation but did not require integration. At the same time, the U.S. Court of Appeals for the Fifth District "held that there was indeed an affirmative duty on the part of government to integrate the schools where de jure segregation had existed prior to Brown."[17] A rule of law evolved that required affirmative action by Southern de jure states, but did not force Northern de facto

states to act affirmatively to move children to assure integrated schooling.

Civil Rights Act of 1964. Its passage "gave teeth to federal desegregation efforts by decreeing that federal monies would be withheld from institutions that discriminated according to race, religion, or ethnic origin."[18] In 1966, the U.S. Office of Education attempted to apply pressure for racially balanced schools by threatening to cut off federal funds earmarked for education. Interestingly, Meyer Weinberg stated that during the four years following the passage of the Civil Rights Act much more desegregation occurred than in the years following Brown and ending with the Civil Rights Act itself.[19]

Green v. County School Board of New Kent County, 391 U.S. 430, 1968. In this landmark case, heard by the Fourth Circuit and then by the Supreme Court, the school board was maintaining two schools on opposite sides of a community in which there was no residential segregation. The Board had chosen to remain eligible for federal funds by adopting a freedom of choice plan in which all but first and eighth grade students could choose where they would attend school. Both the District Court and Fourth Circuit Court of Appeals approved this plan. Although no white student chose to attend the all-black school, some black students elected to attend the formerly all-white school (85% of the black students within the district still attended the all-black school). The Supreme Court stated : "The burden is on the school board to provide a plan that realistically promises to work NOW."[20] Freedom of choice was not found unconstitutional but as used in New Kent County, it was not acceptable.

In addition, the Supreme Court used the terms *dual* and *unitary* for the first time as characterizations of school systems according to their desegregation status, with the term unitary appearing more as decisions were handed down during the 1970s and 1980s. The court suggested that in the "transition to a unitary nonracial system of public education...consideration had to be given to administration, condition of the school plant, and the school transportation system,"[21] all of which figure prominently in the development of desegregation plans.

Swann v. Charlotte-Mecklenberg Board of Education, 402 U.S. 1, 1970. The Supreme Court heard this landmark case which was the offshoot of a case originally heard in 1965 and a motion for further relief filed in 1968 in the same case. The District Court (1969) had ordered the school board to provide plans for faculty and student desegregation, but the court found the board plan unsatisfactory and appointed an expert to develop a plan for the district's schools. In February 1970, the expert presented a plan which the court adopted. The importance of the case lies not only in its reaffirmation of the fact that District Courts have broad powers to fashion remedies in desegregation cases, but also in the use of experts for the development of desegregation plans.[22]

In Swann, the court stated: "The constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole."[23] This decision provides some

flexibility to districts that have a high percentage of minority students and that must deal with geographic and demographic anomalies. Additionally, the court spoke to the issue of majority to minority transfers, an idea that would appear in many future cases as a possible interdistrict solution to segregation. The court defined clearly those aspects of the school and school system that would need to be considered in the development of desegregation plans for the 1970s and beyond. Also, the court asked that care be taken to ensure that future school construction did not perpetuate a dual system. An important component in this case was the holding by the court that "the constitution does not prohibit District Courts from using their equity power to order the assignment of teachers to achieve a particular degree of faculty desegregation."[24]

Swann defined the four areas to be considered relative to student assignment in desegregation cases: (1) racial quotas, but only as a starting point; (2) one-race schools, these may not be indicative of a system practicing segregation in or of itself; (3) attendance zones, the pairing and clustering of zones is considered permissible; and (4) transportation, so long as it does not risk the health of children or the educational process itself.[25] The full impact of Swann was that it was no longer simply sufficient to eliminate segregation but, rather, that desegregation had to be achieved to the greatest extent possible, using "every available device."

North Carolina State Board of Education v. Swann, 402 U.S. 43, 1970. The case was heard simultaneous to Swann v. Charlotte Mecklenberg. The court held that North Carolina's anti-busing law, which forbade assignment of any student based on race, was invalid.[26] Davis v. Board of Commissioners of Mobile County (402 U.S. 33, 1971) supported and clarified the issues in Swann.

As noted previously, the second phase of desegregation shifted attention from de jure segregation of the South to de facto segregation in other areas of the country. "In 1972, 46% of all black students in the South attended schools where white students were in the majority, as compared to only 28% in the North and the West."[27]

Keyes v. School District No.1, 413 U.S. 189, 93 S. Ct. 2686, 1973. The turning point decision in which the Court ruled that the de facto segregation of the Denver Schools was the result of intentional public policy and, therefore, in violation of Brown. Denver was mandated to racially balance its schools, even if balancing required busing.

Frequently in the 1970s, the courts began to consider any allowance of so called freedom of choice to be a cause of defacto segregation. In fact, in the Green case, the court had made the point that "freedom of choice is not an end in itself in desegregation school districts."[28] Freedom of choice was not seen as an acceptable or sufficient step in the transition to unitary status, ie., release from the aegis of the court with the establishment of the fact that the district is not engaged in or tacitly approving segregative activities or policy. The state, as represented by the school board, must provide a remedy or remedies to address segregative activities and effects. Such remedy must be affirmative and positive and may include many forms

of address including but not limited to busing and quotas; however, quotas may not be used as a single approach to desegregation. In the Swann Case, the court noted that in addition to busing, districts could close schools, build new schools, reassign students, reconfigure grade assignments, and racially mix faculties. These were but a few of the suggested and allowable approaches to desegregation.

Wright v. City Council of Emporia, 407 U.S. 451, 1972. Another national case that portended the end of freedom of choice. The court added to the equation for desegregation that, in addition to the established standard of pairing and changing student assignments and attendance zones, consideration of motives was not sufficient. In fact, the effects of actions taken would have to receive major consideration.

Keyes v. School District No.1, 413 U.S. 189, 1973. This Denver case addressed the issue, not unlike that raised in Brown I, of the quality of facilities of inner city schools and called for these facilities to be comparable to those found in predominantly white suburban areas. This decision addressed itself not only to the plight of predominantly African-American schools but also to that of Hispanic students in inner city schools. Furthermore, the decision placed the burden on the school district and its officials to prove that their actions were not motivated by segregative intent.

Other defining cases followed, each moving farther and farther from the use of freedom of choice. Within American society throughout the 1970s and into the early 1980s, minorities and many white Americans continued to call for busing and mixing of the races by assignment. Charles Willie and Michael Alves from Harvard University began to suggest that the only choice school district patrons have in the schools that their children could attend should be one of controlled choice. The control had to rest with the school district officials who would attempt to but who could not guarantee the assignment of children, even if parents wished to send their children to neighborhood schools. Districts such as Cambridge, Massachusetts adopted controlled choice as an alternative to freedom of choice.

State-created district lines were recognized in litigation as potential creators of problems in attempts to desegregate. This was typified by the establishment of a special school district by the Arkansas legislature and led to the eventual creation of a 70% minority district in a city that was 30% minority by encasing the city in a ring of county districts not contiguous with the city boundaries. Little Rock could not "grow" the district as the city grew and, therefore, the financial base of the district eroded with the growth of the city.

Milliken I, 418 U.S. 717, 1974. The Midwest was not immune from addressing desegregation concerns. This Detroit case focused on racial segregation in a city school district as well as on three other districts within the metropolitan area. Calling the existing district lines "realities of political convenience," the court endorsed a metropolitan plan in which students would cross those lines in order to implement desegregation. The court did note, however, that local citizens should have the

opportunity to participate in decisions with regard to how this would be accomplished in order to meet local educational needs.[29] In a similar case relative to a California school district, Pasadena City Board v. Spangler (427 U.S. 424, 1975), the Supreme Court held that a district court could not require annual adjustments of attendance zones. In a second incarnation of the Spangler case, an Appeals Court clearly stated that "the adoption of a neighborhood plan was not necessarily synonymous with an intent to discriminate."[30]

1977 brought another rendition of the Milliken case, Milliken II.[31] The contribution of the courts in this case was the addition of educational components required in school assignment plans. The State of Michigan was directed to pay for the costs of these educational components at least in part. Those mandated programs were remedial or compensatory education programs for children who had been negatively impacted by the existence, or vestiges, of segregation.[32] The idea was that because the state had at least partial responsibility for prior segregative activities, the state had at least partial responsibility for bearing the costs of remediating such practices.

The definition of unitary status clearly emerged from the combined cases of Swann, Brown II, Milliken, and others. The components of a unitary system were identified by the courts as the elimination of a discriminatory system, resolution of all constitutional violations peculiar to the district, revision of district policies to prevent recurrence of these violations, and restoration of student status to that which it would have been absent segregative activities. Once these parameters were clearly defined, the goal of most school boards presiding over school districts that had been touched by law suits became the achievement of unitary status. Throughout the 1980s, however, desegregation issues continued to arise in virtually every circuit. The remedies in some cases included receivership for the school district (Morgan v. McDonough, a Boston case); a finding that the state was at least partially culpable as well as court-ordered interdistrict remedies such as magnet schools and interdistrict transfers as the solution to segregation (U.S. v. Board of School Commissioners of the City of Indianapolis, Indiana, 632 F2d. 1101, 1980); and a mandate that required the state to pay salaries of the staff of court appointed desegregation experts who would oversee implementation of remedies ordered by the court (Oliver v. Kalamazoo, 640 F2d. 782, 1980).

It seemed that with greater frequency during the 1970s and 1980s, the courts were taking the issue of desegregation out of the hands of citizens and their elected school boards via ordering rather than suggesting remedies, appointing "outsiders" or experts to oversee desegregation, or redefining the geographical boundaries or areas and populations which would figure into the creation of remedies to segregation. In the New York cases Arthur v. Nyquist (712 F2d. 809, 1983) and Arthur v. Nyquist and Buffalo Teachers Federation (712 F2d. 816, 1983) it was made clear that the court would monitor the expenditure of dollars ordered paid by the state as a partial remedy in order to ensure the appropriate expenditure of that money to address issues of desegregation.[33]

During the second half of the 1980s, the courts went even further and began to hold cities responsible for remediating segregative practices within their jurisdictions. One such case was U.S. v. Yonkers Board of Education (624 F2d 1276, 1985). In this case, residential patterns had contributed to the problem of segregation. The city was joined in the case as having responsibility for this by virtue of past practice relative to housing subsidies within the municipality.

On the heels of this decision, petitions were filed in various courts asking for unitary status. In other cases, suits were filed and unitary status was found even though, on the face of it, the district appeared to be causing de jure segregation in its policies and activities. In Whittenberg v. School District of Greenville County (607 F. Supp. 289, 1985), the district court found that a unitary system was being operated by the school board in spite of the fact that there were population variances based on race from school to school and grade to grade. In essence, the court found that the district had made efforts to maintain a racial balance and had written policies prohibiting discrimination based on race. In its opinion, the court noted that decisions with regard to conversions, closings, and openings of schools rested primarily with the district. In other words, the court chose not to intervene.[34]

In 1986, the court in the Fourth Circuit went even further in this direction. In Riddick by Riddick v. School District of the City of Norfolk (784 F2d. 521), the student assignment plan of the district, previously declared unitary, was challenged by black students. The court maintained the unitary status and noted that the school board could legitimately consider the presence of "white flight" in pursuing a voluntary plan to stabilize school integration, absent proof of a discriminatory intent. This decision had a sense of freedom of choice about it. The language of the court was that "although white flight cannot be the reason for failure to dismantle a dual school system, it can be considered in devising a voluntary plan to improve racial balance of the schools."[35] Subsequently, several other districts have gained unitary status. Among them are DeKalb County (Georgia) and Dallas (Texas). In the latter case, Judge "Barefoot" Sanders kept the district on probation for three years before providing full unitary status. Still, there is racial strife within the districts and in the case of Dallas, within the membership of the school board.

As more and more districts are released from court jurisdiction, there is a return in many of those districts to the concept of neighborhood schools and freedom of choice. Courts do not seem to be intervening in these cases. It is clear, however, that issues relative to desegregation continue to exist even in the face of significant changes in the philosophy of the courts away from freedom of choice and back toward it.

Endnotes

1. Green v. County School Board of New Kent County, 391 U.S. 430, 1968
2. Swann v. Charlotte-Mecklenberg Board of Education, 410 U.S. 1, 1970
3. Wright v. City Council of Emporia, 407 U.S. 451, 1972

4. Keyes v. School District No. 1, 413 U.S. 189, 1973
5. Ibid.
6. Alexander, K., & Alexander, M.D. (1985). *The American Public School Law* (2nd ed.). St. Paul: West Publishing Company, pp. 405-406.
7. Ibid.
8. Ibid.
9. Ibid.
10. Ibid.
11. Ibid. , p. 408
12. Brown v. Board of Education of Topeka, Kansas, 347 U.S. 483, 1954, at 495
13. Brown v. Board of Education of Topeka, 349 U.S. 294, 1955, at 301.
14. It was widely assumed in the late 1950s and early 1960s that choice would desegregate the schools. It did not in most districts, however, because both black and white parents were reluctant to send their children to schools that had formerly been populated by the opposite race.
15. Parkinson, H.J. (1991). *The Imperfect Panacea: American Faith in Education, 1865-1900* (3rd ed.). New York: McGraw-Hill, p. 60.
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17. Ibid.
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19. Stevens, E., Jr., & Wood, G.H. (1995). *Justice, Ideology, and Education: An Introduction to the Social Foundations of Education*. New York: McGraw-Hill, p. 11.
20. Green v. County School Board of New Kent County, 391 U.S. 430, 1968, at 438.
21. Ibid., at 436.
22. Swann V. Charlotte-Mecklenberg Board of Education, 401 U.S. 1., 1970, at 16.
23. Ibid., at 24.
24. Ibid., at 24.
25. Ibid., at 29-31.
26. North Carolina State Board of Education v. Swann, 402 U.S. 43, 1970, at 45.
27. Webb, L. D., Metha, A., & Jordan, K.F. (1996). *Foundations of American Education* (2nd ed.). Englewood Cliffs, NJ: Merrill, p. 303.
28. Alexander, et al., p. 423.
29. Milliken v. Bradley, p. 742.
30. Spangler v. Pasadena, 611 F2d. 1239, p. 1245.
31. Milliken v. Bradley (II), 433 U.S. 267, 1977
32. Ibid., p. 276.
33. Arthur v. Nyquist, 712 F2d. 809, 1983, p. 812.
34. Greenville County, 607 F. Supp. 289, 1985, p. 291.
35. Riddick by Riddick, 784 F2d. 521, 1986, pp. 528-529.